

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DAVID D. MCCONVILLE,
Petitioner,
vs.
JEFFERY UTTECHT,
Respondent.

NO. CV-10-3082-RMP

ORDER DENYING MOTION TO STAY
AND DISMISSING PETITION IN PART
WITH PREJUDICE AND IN PART
WITHOUT PREJUDICE

By Order filed October 18, 2010, the court directed Mr. McConville to show cause why his federal habeas petition should not be dismissed pursuant to *Stone v. Powell*, 428 U.S. 465, 494 (1976), as Petitioner had indicated he litigated the legality of his search and seizure under the Fourth Amendment in the Washington state courts. On November 12, 2010, Mr. McConville filed a "Motion to Stay Proceedings and Hold in Abeyance" (Ct. Rec. 7), which he failed to note for hearing as required by LR 7.1(h), Local Rule for the Eastern District of Washington. **PETITIONER IS CAUTIONED THAT ANY FURTHER MOTIONS SUBMITTED TO THE COURT WITHOUT NOTING THEM FOR HEARING IN COMPLIANCE WITH THE LOCAL RULES WILL NOT BE ADDRESSED BY THE COURT.** Because Petitioner is proceeding *pro se*, the court has heard his motion without oral argument on the date signed below.

MOTION FOR STAY AND ABEYANCE

Mr. McConville asks the court to stay these proceedings while he pursues a "new
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1 claim” challenging the role of a Court Commissioner in his direct appeal. The court
2 finds this claim would not warrant implementation of the stay and abeyance procedures
3 under *Rhines v. Weber*, 544 U.S. 269 (2005).¹

4 In support of his request to stay these proceedings, Petitioner relies on *State v.*
5 *Philip*, 44 Wash. 615, 87 P. 955 (1906). *Philip* held a court commissioner at the superior
6 court level “had no power to accept a plea of guilty on an information for a felony and
7 sentence the defendant to imprisonment thereon.” *Philip* did not address the authority of
8 a Court Commissioner at the appellate court level. Petitioner has presented
9 documentation stating he had the opportunity to file objections to the Commissioner’s
10 Ruling. He has shown no improper delegation of duty. Therefore, **IT IS ORDERED**
11 Petitioner’s Motion (Ct. Rec. 7) is **DENIED**.

12 **FOURTH AMENDMENT CLAIM**

13 Mr. McConville continues to assert this court should consider his Fourth
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16 The stay and abeyance procedure was implemented to accommodate the federal
17 statute of limitations, 28 U.S.C. § 2244(d). Mr. McConville was sentenced on March 30,
18 2009. He filed a direct appeal and the Washington State Supreme Court denied his
19 Petition for Review on August 5, 2010. *See State v. McConville*, 169 Wash.2d 1016, 236
20 P.3d 895 (2010). Petitioner indicates in his motion that he still has time to file a personal
21 restraint petition in the state courts. A prisoner is entitled to tolling of the federal
22 limitations period for the pendency of a “properly filed application for State
23 post-conviction or other collateral review with respect to the pertinent judgment or
24 claim.” 28 U.S.C. § 2244(d)(2); *see also Artuz v. Bennett*, 531 U.S. 4, 5, (2000).
25 Therefore, it does not appear a stay and abeyance of these proceedings, rather than
26 dismissal without prejudice to seeking available state court remedies, would be
27 appropriate.

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1 Amendment Claim. He contends *Arizona v. Gant*, ___ U.S. ___, 129 S.Ct. 1710, 173
2 L.Ed.2d 485 (April 21, 2009), is the “controlling authority on his Fourth Amendment
3 claim.” If Petitioner wishes to challenge the legality of his search and seizure under
4 *Gant*, he must do so in the state court.

5 Contrary to Petitioner’s assertion, even if *Gant* would apply to his Fourth
6 Amendment claim, this would not entitle Petitioner to federal habeas review under *Stone*
7 *v. Powell*. Petitioner has presented no facts showing he has been denied the opportunity
8 to fully and fairly litigate his Fourth Amendment claim in state court. *Id.*, 428 U.S. at
9 494. Indeed, it does not appear he presented a Fourth Amendment claim to the
10 Washington State Court of Appeals, Division III, on direct appeal. *See* page 2, item 9(f).
11 Consequently, Mr. McConville has failed to show cause why his Fourth Amendment
12 claim should not be dismissed under Rule 4, Rules Governing § 2254 Cases.

13 **INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM**

14 Although a Fourth Amendment claim would be precluded by *Stone v. Powell*, a
15 habeas petitioner may bring an ineffective assistance of counsel claim based on counsel’s
16 failure to properly raise the Fourth Amendment issue. *See Kimmelman v. Morrison*, 477
17 U.S. 365 (1986). In his motion, Mr. McConville concedes he did not adequately allege
18 an ineffective assistance of counsel claim in his federal habeas petition. It also appears
19 Petitioner did not properly exhaust an ineffective assistance of counsel claim in the state
20 courts.

21 Petitioner indicates he presented a claim of ineffective assistance of counsel in his
22 direct appeal to the Washington State Court of Appeals, Division III. Ordinarily, a claim
23 of ineffective assistance of counsel is not brought on direct appeal. Such a claim
24 involves matters outside the record and should properly be brought in a petition for state
25 collateral review. Petitioner does not indicate he properly presented an ineffective
26 assistance of counsel claim in a personal restraint petition.

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1 Before a federal court will consider the merits of a writ of habeas corpus pursuant
2 to 28 U.S.C. § 2254, the petitioner must demonstrate that each and every claim in the
3 petition has been presented for resolution by the State Supreme Court. A state prisoner
4 must exhaust state Supreme Court remedies with respect to each claim before petitioning
5 for a writ of habeas corpus in federal court. *Granberry v. Greer*, 481 U.S. 129, 134
6 (1987); *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994); *Bland v. Calif. Dept. of*
7 *Corrections*, 20 F.3d 1469, 1472 (9th Cir. 1994). The exhaustion requirement protects
8 the role of state courts in enforcing federal law, prevents the disruption of state judicial
9 proceedings, and gives the state's highest court the opportunity to examine and vindicate
10 a right of federal constitutional magnitude. *Rose v. Lundy*, 455 U.S. 509, 518-20 (1982).

11 A claim is considered exhausted when it has been fully and fairly presented to the
12 state Supreme Court for resolution under federal law. *Anderson v. Harless*, 459 U.S. 4
13 (1982); *Harris v. Pulley*, 852 F.2d 1546, 1569-71 (9th Cir. 1988), *opinion amended on*
14 *other grounds and superseded by* 885 F.2d 1354, *cert. denied*, 493 U.S. 1051 (1990).
15 Moreover, a petitioner seeking relief must have presented each claim to the state
16 Supreme Court based upon the same federal **legal** theory and the same **factual** basis
17 asserted in the federal petition. It is only then that the exhaustion requirement of 28
18 U.S.C. § 2254 is fulfilled. *Hudson v. Rushen*, 686 F.2d 826 (9th Cir. 1982), *cert. denied*,
19 461 U.S. 916 (1983); *Schiers v. People of State of California*, 333 F.2d 173 (1964). It
20 appears Mr. McConville's ineffective assistance of counsel claim has not been properly
21 exhausted in the state courts.

22 Therefore, **IT IS ORDERED** Mr. McConville's petition is **DISMISSED in part**
23 **with prejudice** as to Petitioner's Fourth Amendment claim and **DISMISSED in part**
24 **without prejudice** as to his claim of ineffective assistance of counsel. Petitioner should
25 pursue appropriate relief in the state courts. Petitioners should also be mindful the
26 Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) 's one-year limitations
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1 period is not statutorily tolled during the pendency of a federal habeas petition, *see*
2 *Duncan v. Walker*, 533 U.S. 167, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001).

3 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
4 Order, enter judgment, forward a copy to Petitioner, and close the file. The court further
5 certifies that pursuant to 28 U.S.C. § 1915(a)(3), an appeal from this decision could not
6 be taken in good faith, and there is no basis upon which to issue a certificate of
7 appealability. 28 U.S.C. § 2253(c); Fed. R.App. P. 22(b).

8 **DATED** this 16th day of November 2010.

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10
11 s/ Rosanna Malouf Peterson

12 ROSANNA MALOUF PETERSON
13 UNITED STATES DISTRICT JUDGE
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